Crumbling Patchwork: Massachusetts's Efforts to Fill the Gaps Left by Crawford are now Redundant

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CRUMBLING PATCHWORK: MASSACHUSETTS’S EFFORTS TO FILL THE GAPS LEFT BY CRAWFORD ARE NOW REDUNDANT

Recent decisions by courts at all levels have made a mess of Confrontation Clause analysis. By distinguishing between testimonial and non-testimonial statements, and then choosing not to elaborate, the United States Supreme Court wreaked havoc upon the state courts’ interpretation of hearsay jurisprudence. In response, Massachusetts courts hastily constructed guidelines to adjust to this development, but as the Supreme Court continues to interpret the right of confrontation, some of the Commonwealth’s framework has become redundant or inconsistent.

I. INTRODUCTION

In the Confrontation Clause, the United States Constitution gives criminal defendants the right to confront their accusers.1 That right has ancient roots preceding the Constitution.2 However, nearly as long as the right to confront one’s accusers has existed, exceptions have been recognized.3 Until recently, the Supreme Court interpreted the Confrontation Clause to include all the exceptions afforded to the hearsay doctrine, as well as evidence that bore “particularized guarantees of trustworthiness” that indicated the statements were “reliable.”4 Eventually, scholars, judges, and commentators criticized this approach, arguing that

1. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him...”)
3. See id. at 491-92 (identifying exception to right of confrontation circa 491 A.D.).
4. Ohio v. Roberts, 448 U.S. 56, 66 (1980) (“When a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate ‘indicia of reliability.’ Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.”), abrogated by Crawford v. Washington, 541 U.S. 36, 68 (2003).
judges implementing the reliability standard had developed a confusing body of caselaw that made predicting the admissibility of out-of-court statements an unreliable process.\(^5\) Seeking to remedy this perceived unfairness, the Supreme Court rendered *Crawford v. Washington*.\(^6\) In that decision, the Court held that under the Confrontation Clause, out-of-court statements elicited by police interrogation were testimonial, and therefore inadmissible, unless the defendant had the opportunity to cross examine the declarant.\(^7\)

*Crawford* sent ripples through the legal community in three ways: (1) it revealed that the protections provided by the Confrontation Clause are separate from *stare decisis* hearsay; (2) it emphasized the need to distinguish testimonial and non-testimonial out-of-court statements, but failed to provide a clear definition of “testimonial statements”; and (3) it suggested all statements made in the course of law enforcement interrogations are testimonial, but lacked a clear description of what constitutes an interrogation.\(^8\) The Massachusetts Supreme Judicial Court

\(^5\) See Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1027 (1998) (criticizing reliability as “poor criterion” for hearsay exceptions and Confrontation Clause analysis). Confrontation Clause interpretation under *Roberts* was also criticized as overly pedantic:

At common law, the traditional hearsay “rule” was notoriously un-ruly, recognizing countless exceptions to its basic preference for live testimony; and more recent statutes have proliferated exceptions. But the words and grammar of the Confrontation Clause are emphatically rule-ish: “In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him”—no ifs, ands, or buts. And so the modern Court has put itself in a bind. If the clause does truly prohibit all hearsay, as its grammar might imply, it is utterly unworkable; but to make it workable—by recognizing commonsensical exceptions—is to offend its seeming grammar.

Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 647 (1996). Instead of using linguistic analysis and legal interpretation to clarify the Confrontation Clause, it seemed the *Roberts* Court instead clouded the Framers’ intent. Id. at 647-49.


\(^7\) Id. at 68; see also infra Part II.A (discussing *Crawford*).

(SJC) addressed these issues in *Commonwealth v. Gonsalves*, clarifying the definitions of “testimonial” and “interrogation,” as well as creating a two-part procedure courts could use to determine whether a statement is testimonial per se or testimonial in fact.

Despite its initial value to the Massachusetts courts, *Gonsalves* has become less applicable in the wake of the Supreme Court decisions in *Davis v. Washington* and *Michigan v. Bryant*, as these decisions have caused the SJC to adjust its analytical method of evaluating the admissibility of testimonial evidence. The Supreme Court, however, has not addressed all the questions left open by *Crawford*, and *Gonsalves* remains applicable in Massachusetts under some circumstances. Nevertheless, to the extent *Gonsalves* can be interpreted to create procedural steps or substantive law, it should be abandoned by all Massachusetts courts.

II. A DAM AGAINST HEARSAY: THE DEVELOPMENT OF CONFRONTATION CLAUSE JURISPRUDENCE

Despite its ancient roots, the right to confront one’s accusers in the American criminal justice system has evolved along with Western civilization. The Framers, who were familiar with Sir Walter Raleigh’s...
infamous trial for treason, were influenced heavily by British common law and saw fit to enshrine the right in the Sixth Amendment of the U.S. Constitution. For as long as the right has been recognized, courts have made exceptions by allowing the admission of statements made by absent persons into evidence. For a generation, the admissibility of these words was controlled by hearsay common law and by the judiciary’s notions of the evidentiary reliability. If the declarant was unavailable, their statements remained admissible if the offering party showed “particularized guarantees of trustworthiness.”

See Richard J. Goldstone, Forward to WILLIAM BLACKSTONE, THE COMMENTARIES OF SIR WILLIAM BLACKSTONE, KNIGHT, ON THE LAWS AND CONSTITUTION OF ENGLAND i, at iii, v–vi (Amer. Bar Ass’n ed., 2009) (describing influence of British common law on Framers). Compare id. at 460 (“[Defendants] shall have . . . compulsive process to bring in his witnesses for him, as was usual to compel their appearance against him.”), with U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .”). In 1603, Sir Walter Raleigh of England famously faced a false capital charge of treason. See generally RENNELL RODD, SIR WALTER RALEIGH, 201-30 (1904) (detailing Sir Walter Raleigh’s false capital charge of treason). Raleigh’s accuser, Lord Cobham, faced similar charges, and only made his allegations after the prosecution falsely told him that Raleigh intended to testify against him. Id. at 208-09. Cobham fabricated the allegations to get revenge against Raleigh. Id. At Raleigh’s trial the prosecution refused to examine Cobham directly, instead relying upon the out-of-court statements he made under their false pretenses. Id. at 221. Raleigh demanded the opportunity to face his accuser: “Let Cobham be here, let him speak it. Call my accuser before my face . . . .” Herrmann & Speer, supra note 2, at 545. The judges refused his demand on the most damning of rationales—if Cobham were present, he might recant his allegations, destroying the prosecution’s case. See id. (“[T]o save [Raleigh], his old friend, it may be that [Cobham] will deny all that which he hath said.”). Later, one of the presiding judges lamented that “the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.” 1 DAVID JARDINE, CRIMINAL TRIALS 435, 520 (1832).

See Peter Nicolas, “I’m Dying to Tell You What Happened”: The Admissibility of Testimonial Dying Declarations Post-Crawford, 37 HASTINGS CONST. L.Q. 487, 495 (2010) (explaining pre-revolutionary roots of dying declaration exception to Confrontation Clause). The dying declaration exception to the hearsay rule, for example, was a well-rooted fixture in British common law in the Framers’ time. See id. at 495-96.

See Friedman, supra note 5, at 1014-15 (describing confluence of hearsay common law and Confrontation Clause jurisprudence).

A. The Levy Breaks: Crawford v. Washington

As a result of this open-ended policy, courts and academics worried the ever-growing number of hearsay exceptions would render the Confrontation Clause moot.1 Uneasy with this development, the Supreme Court recognized the procedural protections guaranteed by the Confrontation Clause in Crawford v. Washington.2 In Crawford, the prosecution sought to admit voice-recorded inculpatory statements made by the defendant’s wife to police while they were investigating the stabbing of a man who allegedly attempted to rape her.3 Citing spousal privilege, she refused to testify at trial.4 Over the defendant’s objection, the prosecution persuaded the trial court to allow the recording to be admitted, arguing it was sufficiently trustworthy.5 The defendant’s appeal went all the way to the Supreme Court, who unanimously held that the statement should have been excluded because its admission violated the defendant’s Sixth Amendment confrontation right.6

Writing for the Court in Crawford, Justice Scalia declared that judicial determination of a statement’s reliability absent the cross-examination of the declarant fails to satisfy the Confrontation Clause.7 Testimonial statements must be subject to cross-examination not only

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22 541 U.S. 36, 51 (2004). The open-ended nature of Roberts was especially troubling to the Court because such an amorphous standard allowed courts too much discretion. Id. at 67-68. The majority found that “[b]y replacing categorical constitutional guarantees with open-ended balancing tests, [the Court will] do violence to [the Framers’] design. Vague standards are manipulable . . . .” Id.

23 Id. at 40; see also WASH. REV. CODE § 5.60.060 (1994) (“A spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner . . . .”). Despite this privilege, prosecutors may seek to enter a spouse’s out-of-court statements if they are admissible under a hearsay exception. See State v. Burden, 841 P.2d 758, 763 (Wash. 1992) (en banc) (“[T]he [marital] testimonial privilege [is] not served by excluding third person testimony of a spouse’s extrajudicial statements and . . . the admission of such testimony does not violate [the marital privilege law].”).

24 Id. at 38.


26 Crawford, 541 U.S. at 68-69.

27 Id. at 62. The Court found that while the Framers would certainly approve of some judicial flexibility, they clearly dictated that defendants must have an opportunity for cross-examination if testimonial statements by unavailable witnesses are to be admitted. See id. at 61, 68 (describing Framers’ attitudes toward testimony of unavailable declarants).
because judicial assessment of reliability is unpredictable, but also because
courts might mistakenly admit “core testimonial statements that the
Confrontation Clause plainly meant to exclude.”

To restore the protections against false testimony offered by the procedure, the Court
ruled a defendant must have the opportunity to cross-examine witnesses
regarding their out-of-court testimonial statements in order for them to be
admissible.

Leaving room for the admission of some out-of-court statements
made by unavailable declarants, Justice Scalia distinguished testimonial
statements from non-testimonial statements in the Crawford opinion. Although the Court offered a number of formulations, it left the
“comprehensive definition of ‘testimonial’” to future decisions, ruling that
the statements at bar—statements taken by police officers in the course of
interrogation—fit the definition under any standard. Additionally, Justice Scalia left the definition of “interrogation” open, suggesting only that he
intended the term “in its colloquial, rather than any technical legal,
sense.” In his concurrence, Justice Rehnquist criticized the

28 Id. at 61, 63. Justice Scalia noted the irony that a Roberts analysis may well have admitted
Lord Cobham’s testimony in Sir Walter Raleigh’s trial. Id. at 62.
29 Id. at 61 (“[W]e impose an absolute bar to statements that are testimonial, absent a prior
opportunity to cross-examine ....”). To be admissible, out-of-court statements offered to prove
their truth must meet a hearsay exception and satisfy Crawford’s requirements. Id. at 68.
30 See id. at 51-52 (suggesting “off-hand, overheard remarks” do not implicate Confrontation
Clause, but may remain inadmissible hearsay.
31 Crawford, 541 U.S. at 51-52:

Various formulations of this core class of “testimonial” statements exist: “ex parte in-
court testimony or its functional equivalent—that is, material such as affidavits,
custodial examinations, prior testimony that the defendant was unable to cross-
examine, or similar pretrial statements that declarants would reasonably expect to be
used prosecutorially,”; “extrajudicial statements ... contained in formalized
testimonial materials, such as affidavits, depositions, prior testimony, or confessions,”;
[and] ... “statements that were made under circumstances which would lead an
objective witness reasonably to believe that the statement would be available for use at
a later trial.”

Id. (citations omitted). This broad range of possible definitions resulted in overwhelming
criticism throughout the legal community. See, e.g., Richard D. Friedman, Grappling with the
to define “testimonial”); Adam Silberlight, Confronting a Testimonial Definition in a Post-
Crawford Era, 29 AM. J. TRIAL ADVOC. 65 passim (2005) (same); Jeffrey A. Zick, Rethinking
Confrontation, ARIZ. ATT’Y, Sept. 2006 at 1, 30 (same).
32 Crawford, 541 U.S. at 53 n.4 (leaving precise definition of “interrogation” for later
consideration). Commentators immediately seized upon this omission as a source of potential
confusion. See Miguel A. Méndez, Crawford v. Washington: A Critique, 57 STAN. L. REV. 569,
602 n.187 (2004) (considering range of law enforcement interactions people might consider
interrogations). Moreover, this scant advice left courts with little guidance about whose
testimonial/nontestimonial distinction, arguing that it not only lacked historical basis, but also that leaving these definitions unresolved left lower courts and prosecutors "in the dark."

B. The SJC Stacks Sandbags: Commonwealth v. Gonsalves

As Justice Rehnquist predicted in his concurring opinion in Crawford, the SJC quickly found itself stumbling in the dark with Commonwealth v. Gonsalves: a case Crawford controlled but could not be resolved without further interpretation of what constituted a "testimonial" statement or an "interrogation."

In its decision, the SJC noted that it had insufficient guidance from the Supreme Court to determine whether statements made to persons other than law enforcement officers or statements spontaneously offered should be considered testimonial. In its attempt to refine the definition of "testimonial," the SJC drew another distinction, parsing a line between statements that are testimonial per se and those that are testimonial in fact. Statements are testimonial per se when they are made in response to police interrogations. Alternatively,
statements are testimonial in fact when they are made under circumstances that the “declarant would reasonably believe that his or her statement might be used at trial.” Neither formulation relies upon “the declarant’s knowledge of trial procedure or the formality of the statement,” but instead “focuses on the declarant’s intent by evaluating the specific circumstances in which the out-of-court statement is made.” From this viewpoint, “all statements the declarant knew or should have known might be used to investigate or prosecute an accused” are testimonial. No other state has explicitly adopted the testimonial-per-se/testimonial-in-fact distinction as part of their Crawford analysis.

The SJC also struggled to ascertain what Justice Scalia described as the “colloquial” understanding of interrogation, settling upon “all law enforcement questioning related to the investigation or prosecution of a

the statement is part of an affidavit, deposition, confession, or prior testimony at a preliminary hearing, before a grand jury, or at a former trial, or if it was procured through law enforcement interrogation.” Gonsalves, 833 N.E.2d at 558.

38 Gonsalves, 833 N.E.2d at 557 (“Crawford at least suggests that the determinative factor in determining whether a declarant bears testimony is the declarant’s awareness or expectation that his or her statements may later be used at a trial.”) (quoting United States v. Soget, 377 F.3d 223, 228-29 (2d Cir. 2004)). Not all state courts arrived at the same conclusion. See Hammon v. State, 809 N.E.2d 945, 952 (Ind. Ct. App. 2004), vacated, 829 N.E.2d 444 (Ind. 2005), cert. granted, 546 U.S. 976 (2005), rev’d and remanded sub nom. Davis v. Washington, 547 U.S. 813 (2006) (“It appears to us that the common denominator underlying the Supreme Court’s discussion of what constitutes a ‘testimonial’ statement is the official and formal quality of such a statement.”).

39 Gonsalves, 833 N.E.2d at 558. The SJC also considered other courts’ interpretations, namely that the purpose of the statement was the controlling factor (without clarifying whose purpose—the interrogator’s or the declarant’s). Id. at 557-58; see also People v. West, 823 N.E.2d 82, 91-92 (Ind. Ct. App. 2005) (specific content, purpose, and facts surrounding each statement relevant to analysis); People v. Cortes, 781 N.Y.S.2d 401, 414-15 (N.Y. Sup. Ct. 2004) (discussing purpose of statement in evaluating testimonial nature).

40 Gonsalves, 833 N.E.2d at 558. While statements are evaluated on a case-by-case analysis, several factors may be relevant to establishing whether a statement is testimonial in fact, including:

1. to whom was the statement made;
2. whether the statement was made in a public or private setting;
3. the emotional temperature of the declarant and the would-be witness;
4. the motivation behind the out-of-court statement (i.e., whether it was made to stop an ongoing emergency or to provide information related to past events);
5. fully develop the circumstances;
6. whether police were present;
7. the content of the statement at issue; and
8. whether the out-of-court statement was unsolicited or responsive to questioning.

crime.” Under this broad definition, a law enforcement officer’s preliminary fact-gathering to determine if a crime has taken place is an interrogation, and the statements those interrogations elicit are testimonial. The SJC refused to limit the scope of testimony to “formal, solemnized, recorded accounts,” arguing law enforcement officers would attempt to circumvent the Confrontation Clause by taking statements in the most informal circumstances possible.

Because not all statements made to police are related to the investigation or prosecution of a crime, the SJC created an exception to its broad definition of “interrogation.” When police ask questions in the course of ongoing emergencies—to secure volatile scenes or provide medical care—those questions do not qualify as interrogations, and so, under Gonsalves, they were not definitively testimonial per se; nevertheless, courts could still categorize these statements as testimonial in fact.

The Gonsalves Court also had to address another scenario unlike the fact pattern addressed by the Supreme Court in Crawford: the circumstances under which statements from one private citizen to another might be considered testimonial. While those statements could never

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41 Gonsalves, 833 N.E.2d at 554-55 (considering alternate definitions of “interrogation”).
43 See Gonsalves, 833 N.E.2d at 555 (rejecting formality of circumstances as criterion for identifying interrogations). Justice Sosman disagreed, contending formality was a valuable criterion for identifying interrogations. See id. at 564-65 (Sosman, J., concurring in part) (suggesting “interrogation” connotes formal, structured interview).
44 See id. at 556 ("[T]he government’s peacekeeping or community caretaking function is [is] totally divorced from the detection, investigation or acquisition of evidence relating to the violation of a criminal statute.” (quoting Commonwealth v. Evans, 764 N.E.2d 841, 844 (Mass. 2002))). This peacekeeping function is implicated when "‘there is an objectively reasonable basis for believing that the safety of an individual or the public is jeopardized.’” Id. (quoting Commonwealth v. Brinson, 800 N.E.2d 1032, 1037 (Mass. 2003)).
45 See id. at 557 (ordering testimonial-in-fact analysis for statements made to law enforcement during ongoing emergencies); see also Commonwealth v. Foley, 833 N.E.2d 130, 133 (Mass. 2005) (subjecting statements made to law enforcement officer during ongoing emergency to testimonial-in-fact analysis).
46 See Gonsalves, 833 N.E.2d at 561-62 (evaluating whether declarant’s statements to her
qualify as testimonial per se, the SJC ruled they were nevertheless subject to testimonial-in-fact analysis. While the victim’s statements to her mother in *Gonsalves* were nontestimonial, the court admitted there could be circumstances where a reasonable declarant would expect his statements to be used against the accused at trial, even though the listener was not a member of the law enforcement community.

C. The Supreme Court Stems the Tide: *Davis v. Washington*

The open definitions of “testimonial” and “interrogation” led to a number of discordant interpretations, and the Supreme Court soon took up the matter again in *Davis v. Washington*. In *Davis*, the Court sought to resolve the conundrum of how to analyze ambiguous statements that could both address ongoing emergencies and convey information relevant to future prosecution. Justice Scalia, again writing for the Court, introduced the Primary Purpose Test:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the mother were testimonial. Scholars have also considered that statements to private citizens may well be testimonial. See Jeffrey L. Fisher, *What Happened and What is Happening to the Confrontation Clause*, 15 J.L. & POL’Y 587, 616-26 (2007) (considering testimonial nature of statements made to persons other than law enforcement officers); Mendez, *supra* note 32, at 603 (same). Whether statements to employees of private victims’ services organizations, medical personnel, or children’s statements to their parents are testimonial remains unresolved. See Fisher, *supra*, at 616-26 (discussing confusion among courts regarding categorization of statements between private actors); Mendez, *supra* note 32, at 603 (same).

47 *Gonsalves*, 833 N.E.2d at 561-62 (considering whether victim’s statements to her mother were testimonial).

48 See id. (suggesting other declarants could make testimonial statements to private citizens).

49 547 U.S. 813, 823 (2006) (admitting *Crawford* was imprecise).

50 *Id.* For example, law enforcement officers arriving at a crime scene might ask a bystander about what happened and get a response that both seeks emergency help and identifies a criminal suspect. *Id.* If the court characterized the response as an off-hand remark under *Crawford*, it might rule the victim’s statement is nontestimonial. See *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (excepting off-hand remarks from characterization as testimony). Alternatively, another court might characterize the statement as the fruit of an interrogation, and noting its relevance to future prosecution, rule the statement is testimonial. See *id.* at 52 (characterizing statements elicited from law enforcement interrogations as testimonial).
primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.\(^{51}\)

The \textit{Davis} Court also used several criteria to determine if an exchange occurred during an ongoing emergency, including “the level of formality” of the interview.\(^{52}\) In \textit{Gonsalves}, the SJC explicitly rejected this as a criterion for determining if a statement was testimonial, arguing it would encourage law enforcement officers to take statements under informal circumstances to circumvent the Confrontation Clause.\(^{53}\)

\textbf{D. Massachusetts’s Patchwork Holds (Mostly): Commonwealth v. Simon}

The \textit{Davis} Court’s broad definition of “interrogation” and adoption of an ongoing emergency exception affirmed that the SJC’s interpretation of \textit{Crawford} in \textit{Gonsalves} was largely accurate.\(^{54}\) However, the \textit{Davis} Court made one distinction in its ongoing emergency exception that the SJC did not: once a statement qualified for the exception, the court could not subsequently categorize it as testimonial.\(^{55}\) The SJC reacted to the distinction raised in \textit{Davis} in \textit{Commonwealth v. Simon}\(^{56}\) by melding the two-part procedure it constructed in \textit{Gonsalves} with the Supreme Court’s rules from \textit{Davis}.\(^{57}\) In \textit{Simon}, a gunshot victim called 911 to report his injury.\(^{58}\) The SJC considered whether the victim’s statements to the 911 dispatcher were testimonial using the framework it developed in

\(^{51}\) \textit{Davis}, 547 U.S. at 822.
\(^{52}\) \textit{Id.} at 827. The Court also considered the following: (1) whether the declarant made the statements as they were actually happening; (2) whether a reasonable listener would understand the declarant was facing an ongoing emergency; and (3) whether what was asked and answered, viewed objectively, was necessary to resolve the emergency rather than merely learn what happened in the past. \textit{Id.}
\(^{53}\) See \textit{Gonsalves}, 833 N.E.2d at 555 (considering ramifications of identifying formality as indicator of interrogation); \textit{Id.} at 564-65 (Sosman, J., concurring in part) (suggesting interrogation connotes formal and structured interview).
\(^{54}\) See supra Part II.B (discussing SJC’s interpretation of \textit{Crawford} in \textit{Gonsalves}).
\(^{55}\) See \textit{Davis}, 547 U.S. at 822 (ruling statements made during ongoing emergencies are nontestimonial).
\(^{56}\) 923 N.E.2d 58 (Mass. 2010).
\(^{57}\) See \textit{Id.} at 73-74 (discussing effects of \textit{Davis} on Massachusetts two-step Confrontation Clause analytical procedure developed in \textit{Gonsalves}).
\(^{58}\) \textit{Id.} at 62. The victim told the 911 dispatcher that he had been robbed, that he and his brother had been shot, and that he recognized his assailant. \textit{Id.} at 62-63. Despite his serious wounds, the victim provided the dispatcher the defendant’s first name, a physical description of the defendant, a description of the defendant’s automobile, and the location where the defendant worked out. \textit{Id.} at 63. The victim died of causes unrelated to the case before trial, becoming unavailable. \textit{Id.} at 62 n.2. The defendant sought a motion in limine to suppress the victim’s statements to the 911 dispatcher, and the SJC transferred the case from the appeals court on its own motion. \textit{Id.} at 64.
Recognizing the effects of Davis upon the Gonsalves test, the SJC incorporated the emergency exception outlined in Davis into the testimonial-per-se analysis, but ruled the emergency exception did not affect testimonial-in-fact analysis. Among the criteria it adopted to determine if conversations were interrogations, the SJC listed the “level of formality of the interview,” despite its previously held concerns that it might encourage law enforcement officers to elicit information from witnesses in informal settings.

This revision attempted to resolve any discrepancies between Massachusetts’s two-step process and the guidance laid out by the Supreme Court. The Davis decision had largely validated the emergency exception outlined by the SJC in Gonsalves, but did not adopt the SJC’s distinct two-step procedure. Nonetheless, the SJC explicitly noted the two steps outlined in Gonsalves remained the controlling procedure for statements made to people other than law enforcement officers.

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59. Id. at 73-76 (applying two-step Confrontation Clause analysis).
60. See id. at 73-74 (“Statements made in response to police questioning during an emergency are testimonial per se unless the emergency exception, as defined in Davis, applies. To the extent that the exception applies, the statements are not testimonial per se and they will not become testimonial in fact in any circumstances. To the extent that the emergency exception does not apply, statements made in response to police interrogation remain testimonial per se.”). This adjustment foreclosed the possibility that the Massachusetts interpretation would exclude more statements than required by Davis. See Ann Hetherwick Pumphrey, Admissibility of Hearsay Statements to Police: Davis v. Washington and Hammon v. Indiana, BOS. B.J., Nov./Dec. 2006, at 17, 19 (considering effects of Davis on Gonsalves).
61. Compare Simon, 923 N.E.2d at 73 (quoting Commonwealth v. Galicia, 857 N.E.2d 463, 469 (Mass. 2006)) (weighing formality as criterion to determine if conversations were interrogations), with Gonsalves, 833 N.E.2d 549, 555 (Mass. 2005) (rejecting formality of circumstances as criterion for identifying interrogations). This development validated Justice Sosman’s argument that the formality of the exchange between law enforcement officers and declarants was valuable in discerning interrogations (and the testimonial statements that stem from them) and other conversations (and their nontestimonial results). See supra note 43 and accompanying text (describing Justice Sosman’s view).
62. See Simon, 923 N.E.2d at 73 (adjusting Gonsalves’s two-step test to match Davis).
63. Compare supra Part II.C. (discussing Davis’s ongoing emergency exception), with Commonwealth v. Simon, 923 N.E.2d 58, 73-74 (Mass. 2010) (describing emergency exception created by SJC in Gonsalves). In fact, the Massachusetts Attorney General appealed to the Supreme Court to narrow the definition of “interrogation” to include the formality of the exchange as a criterion for determining whether an interrogation was testimonial, but the Court denied certiorari in three separate cases, including Gonsalves. See Roger W. Kirst, Confrontation Rules After Davis v. Washington, 15 J. L. & POL’Y 635, 651-52 (2007) (describing Supreme Court’s implicit validation of SJC’s definition of “interrogation”).
64. See Simon, 923 N.E.2d at 73 n.10 (“[B]oth steps of the test set forth in Commonwealth v. Gonsalves, continue to apply to statements made to people other than law enforcement officers.” (citation omitted)).
III. LEAKS IN THE DIKE: FURTHER HEARSAY AMBIGUITIES
ANPPEAR AFTER CRAWFORD AND DAVIS

A. Michigan v. Bryant

Critics quickly seized upon a further ambiguity left over by Crawford and Davis: when a court is examining whether an interrogation took place, should it consider the intent of the declarant, the interrogator, or both? While the Crawford decision focused largely upon the intent of a reasonable declarant, the primary purpose test outlined in Davis focused on the intent of the law enforcement officer. To resolve this confusion, the Supreme Court addressed the issue in Michigan v. Bryant. Justice Sotomayor, writing for the majority, took an expansive approach, allowing courts to consider the statements and actions of all participants to determine the primary purpose of the interrogation. Warning against misinterpretation, the Court carefully pointed out that "the declarant's statements, not the interrogator's questions" control whether the statement is testimonial. The officer's primary purpose simply provides context the court may use in its analysis of the declarant's statement.


66 See Lininger, supra note 65, at 280 (identifying focal shift from declarant to interrogator as source of confusion).

67 131 S. Ct. 1143, 1157-66 (2011) (clarifying primary purpose test). In Bryant, the Supreme Court considered whether a dying man's description of his attacker to the police was testimonial under the Confrontation Clause. Id. at 1150.

68 Id. at 1162 ("[C]ourts are to] objectively ascertain[] the primary purpose of the interrogation by examining the statements and actions of all participants . . . .").

69 Id. Whether a court considers the interrogator's intent is more than mere legal hairsplitting. See Mark S. Coven & James F. Comerford, What's Going On? The Right to Confrontation, 45 Suffol. U. L. Rev. 269, 279 (2012). Because law enforcement officers speaking to victims will always have prosecution at least partially in mind, courts are more likely to exclude unavailable witnesses' accusatory statements if the officer's intent is controlling. Id. ("By evaluating the interrogator's purpose, the defendant may receive a greater benefit than if only the declarant's actions are examined: the exclusion of a declarant's statement unless the requirements of the Confrontation Clause are satisfied.").

70 See Bryant, 131 S. Ct. at 1162. Justice Scalia dissented in Bryant, accusing the Court of making itself "the obfuscator of last resort." Id. at 1168 (Scalia, J., dissenting). He contended the majority grossly misread Crawford and Davis, arguing it "did not address whose perspective matters—the declarant's, the interrogator's, or both—when assessing 'the primary purpose of [an]
Sotomayor’s clear guidance to focus on the purpose of the statement, limiting consideration of the interrogator’s purpose to a contextual guide, some critics still warn against law enforcement’s manipulation of circumstances to avoid characterization of statements as testimonial by the courts.71

The Bryant decision clarified the Crawford and Davis decisions: statements to law enforcement officers are testimonial when the circumstances would indicate to a reasonable person that they would be used in a subsequent criminal prosecution against the accused.72 When the circumstances indicate there is an ongoing emergency, the declarant’s statements are not testimonial for the purposes of Confrontation Clause analysis.73

B. The Flow is Stymied: Effects of Bryant on Massachusetts Courts

Massachusetts implemented the Bryant rule with little fanfare in Commonwealth v. Smith.74 In this case, police investigating an armed robbery knocked on a suspect’s apartment door, but no one answered.75 As they were leaving, the defendant’s girlfriend burst out of the apartment and appeared to be “‘visibly shaken,’ ‘very nervous,’ and ‘frantic.’”76 Without prompting, she told the police that the defendant had a gun and that he was wrapping it in a black sock.77 At trial, the prosecution, unable to locate the girlfriend, sought to have the police testify to her statements.78 These facts presented a conundrum to the court: when the police arrived at the

72 See Bryant, 131 S. Ct. at 1154 (citing Davis, 547 U.S. at 822) (elaborating on meaning of “testimonial”).
73 Id. (stating difference based on context).
74 951 N.E.2d 674, 681-82 (Mass. 2011) (considering whether declarations meet Bryant’s ongoing emergency criteria).
75 Id. at 679 (describing facts of incident in question).
76 Id.
77 Id. at 680.
78 Id.
apartment, it was clear they did not believe there was an emergency; their primary purpose was to conduct an investigation for later criminal prosecution. However, the circumstances indicated that the girlfriend had a different purpose: to alert the police to an immediate danger. Applying guidance they received from the Bryant Court, the SJC considered whether "the primary purpose of [the] interrogation [was] to enable police assistance to meet an ongoing emergency." Notably, the SJC did not conduct a Gonsalves-type testimonial-per-se or testimonial-in-fact analysis. No clear trend of when courts will use the testimonial per se/in fact rubric has emerged; some Massachusetts courts continue to use this analysis, while others simply cite the case without explicitly going through the steps. Still others forego reliance upon Gonsalves altogether in their consideration of a statement’s testimonial value.

IV. REDUNDANT PATCHWORK: THE GONSALVES DECISION HAS BECOME IRRELEVANT

The SJC first developed its two-part Confrontation Clause analytical procedure in Gonsalves in response to Crawford, a case that was

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79 Smith, 951 N.E.2d at 682 (stating defendant’s arguments that primary purpose was investigation, not emergency response).
80 Id. at 683.
81 Id. at 682 (quoting Davis v. Washington, 547 U.S. 813, 822 (2006)). The court found that the girlfriend’s statements were nontestimonial under the ongoing emergency exception. Id. at 684.
82 See Smith, 951 N.E.2d at 681-84 (rellying upon Crawford Davis Bryant trilogy to determine if declarant’s statements to police were testimonial). The SJC paid passing homage to its own jurisprudence, briefly citing the Simon and Galicia decisions and listing factors courts might consider in determining if an emergency exists, but it did not use the holdings from either case to arrive at its conclusion. See id. at 681-82.
heavily criticized for leaving too many questions unanswered.\textsuperscript{85} At the time, this process seemed necessary.\textsuperscript{86} However, in light of Davis and Bryant, recent Massachusetts decisions indicate the procedure has become increasingly moot in cases where the court evaluates statements to law enforcement officers.\textsuperscript{87}

The Massachusetts response to Crawford in Gonsalves closely mirrored the Supreme Court’s subsequent interpretation of the right to confrontation.\textsuperscript{88} Crawford left open the question of whose intent controlled the determination of whether a statement was testimonial.\textsuperscript{89} Both the SJC and the Supreme Court later held that statements are testimonial when a reasonable person in the declarant’s position would anticipate the statement would be used against the accused in investigating and prosecuting a crime.\textsuperscript{90} Crawford also left open the question of when statements made to police should be considered testimonial.\textsuperscript{91} Both courts determined that if statements are made primarily to obtain help during an emergency, they are not testimonial.\textsuperscript{92} Lastly, the Crawford Court left open the question of how judges should consider the questions and procedures used by law enforcement officers and others to elicit statements from declarants.\textsuperscript{93} Both courts decided that while law enforcement’s questions should be used to inform a judge’s ruling on whether the declarant’s responses are testimonial, the focus of the analysis is on a reasonable declarant’s intent under the circumstances.\textsuperscript{94}

\textsuperscript{86} See Mendez, supra note 33, at 587-88 (outlining uncertainties left by Crawford).
\textsuperscript{87} See cases cited supra note 83 and accompanying text (discussing Gonsalves’s application in recent Massachusetts appellate decisions).
\textsuperscript{88} See supra Part I (discussing federal and Massachusetts Confrontation Clause jurisprudence after Crawford); see also Bhatnagar, supra note 42, at 493 (noting Supreme Court’s Davis decision matched with SJC’s preceding interpretation in Gonsalves).
\textsuperscript{89} See Mendez, supra note 32, at 602 n.187 (describing failures of Crawford and academic criticism).
\textsuperscript{90} Compare Michigan v. Bryant, 131 S. Ct. 1143, 1162 (2011) (describing objective, context-driven analysis courts use to characterize declarant’s statements as testimonial), with Gonsalves, 833 N.E.2d at 555-56 (describing objective, context-driven analysis SJC developed to determine if statements are testimonial-in-fact).
\textsuperscript{91} See Mendez, supra note 32, at 602 n.187 and accompanying text (addressing ambiguity when questioning by police officers is not considered interrogation).
\textsuperscript{92} Compare Davis, 547 U.S. at 822 (explaining statements made to police to secure emergency help are nontestimonial), with Gonsalves, 833 N.E.2d at 555-56 (characterizing statements made to secure “vocalized” scenes or establish need for medical care as nontestimonial).
\textsuperscript{93} See Mendez, supra note 32, at 587-89 (outlining uncertainties left by Crawford).
\textsuperscript{94} Compare Bryant, 131 S. Ct. at 1162 (explaining testimonial qualities are determined using objective intents of both declarant and police), with Gonsalves, 833 N.E.2d at 558 (deciding to objectively evaluate declarant’s statements in context with statements and actions of listener).
While both the SJC’s and the Supreme Court’s principles are harmonious, their processes are not; unlike the Supreme Court, the SJC created a two-step procedure to determine when statements are testimonial. First, Massachusetts courts determine if a statement is testimonial per se, and if not, the court determines if the statement is testimonial in fact. The Supreme Court has instead eschewed developing specific procedures, electing to develop the boundaries of testimonial statements on a case-by-case basis without further segmenting the types of statements through procedural devices. Because Massachusetts has adopted a distinct procedure each time the Supreme Court refines the definition of testimonial, the SJC must adjust its own test to comply.

This difference in analyses has resulted in two major changes since the SJC rendered Gonsalves. First, the Davis decision incorporated the formality of the circumstances as a criterion of courts’ evaluations of exchanges between law enforcement officers and declarants; a concept the SJC had considered, but rejected. Second, the Davis Court held that statements made to law enforcement officers are nontestimonial if the declarant is seeking assistance during an ongoing emergency. Massachusetts trial courts were obliged to subject such statements to further analysis under Gonsalves, leading to the possibility that those statements may be characterized as testimonial during the second step of the analysis.

Today, Massachusetts courts must examine, specifically in the context of statements made to law enforcement officers, whether the statement is testimonial per se, and if it is, whether the statement was made to secure help during an emergency. If the statement qualifies for this emergency exception, then courts may not subsequently characterize it as

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96 See Commonwealth v. Simon, 923 N.E.2d 58, 73-74 (discussing Gonsalves’s two-step analysis); Pumphrey, supra note 60, at 19 (considering Gonsalves analysis).
97 See Bryant, 131 S. Ct. at 1156 (prescribing fact-driven analysis to determine if statements are testimonial).
99 See supra Part II.D (discussing SJC’s adjustment of testimony analysis post-Gonsalves).
103 See Pumphrey, supra note 60, at 19 (describing effect of Davis on Confrontation Clause analysis in Massachusetts).
Today, Massachusetts courts evaluating statements made to law enforcement officers under Gonsalves first consider whether they are testimonial per se, and then, in accordance with Simon, they determine if the emergency exception applies. After Simon, this initial categorization is superfluous: the testimonial-per-se/testimonial-in-fact distinction no longer has any effect in this context because once the court determines the ongoing emergency exception applies, the statements are no longer subject to further analysis under the testimonial-in-fact rubric. In practice, courts can simply ask if a reasonable person in the declarant’s position would anticipate that law enforcement officers would use the statement against the accused in investigating and prosecuting a crime. Courts conducting this fact-driven analysis objectively evaluate all the facts and circumstances surrounding the statement, including the intent of reasonable persons in the parties’ positions and the formality of the encounter, to determine if the statement qualifies as an ongoing emergency. Given the amount of confusion associated with post-Crawford Confrontation Clause cases, Massachusetts should avoid adding steps to the process whenever possible.

The SJC has noted that this two-step procedure remains the appropriate method for determining whether statements made to persons other than law enforcement officers are testimonial because the Supreme Court has not ruled on such a case. As in cases where statements are

\[104\] See id. (describing Simon’s rule foreclosing statements qualifying for ongoing emergency exception from testimonial-in-fact analysis); see also Commonwealth v. Simon, 923 N.E.2d 58, 73 (2010) (“To the extent that the [emergency] exception applies, the statements are not testimonial per se and they will not become testimonial in fact in any circumstances.”).

\[105\] See Gonsalves, 833 N.E.2d at 554-57 (describing two-step process); Pumphrey, supra note 60, at 19 and accompanying text (describing effects of Simon on Gonsalves’s process); see also Commonwealth v. Rodriguez, 833 N.E.2d 134, 135 (Mass. 2005) (ruling statements arising from law enforcement questioning are testimonial per se).

\[106\] See Pumphrey, supra note 60, at 19 and accompanying text (describing present Confrontation Clause analysis).

\[107\] See Michigan v. Bryant, 131 S. Ct. 1143, 1160 (2011) (dictating inquiry courts should use to determine whether statements are testimonial).

\[108\] See id. (describing factors courts should consider in testimonial inquiry).

\[109\] See Gonsalves, 833 N.E.2d at 554-57 (demonstrating confusion associated with post-Crawford Confrontation Clause analysis).

\[110\] See Commonwealth v. Simon, 923 N.E.2d 58, 73 n.10 (Mass. 2010) (instructing courts to use two-step analysis when emergency exception does not apply). Compare Gonsalves, 833 N.E.2d at 561-62 (evaluating statements declarant made to her mother), with Bryant, 131 S. Ct. at 1163-67 (analyzing statements made to police), and Davis, 547 U.S. at 826-32 (analyzing statements made to 911 operator and to police), and Crawford v. Washington, 541 U.S. 36, 65-66 (2004) (analyzing statements declarant made to police).
made to law enforcement officers, no genuine procedural difference exists when declarants make statements to persons other than law enforcement officers because they simply cannot be testimonial per se. Testimonial-per-se statements include affidavits, depositions, confessions, or prior testimony at a preliminary hearing, before a grand jury, or at a former trial, or statements procured through law enforcement interrogation, but not statements made to persons other than law enforcement. If statements made to persons other than law enforcement officers cannot be testimonial per se under the Massachusetts procedure, then the only remaining analysis is whether the statements are testimonial in fact, which is merely an analysis of whether the statement is testimonial at all.

The Supreme Court has not addressed a post-Crawford case involving a contested statement made to a private citizen, but the principles of analysis that emerged from the Crawford–Davis–Bryant trilogy are the substantive equivalent of those settled upon by the SJC in Gonsalves and Simon. Both the Supreme Court and the SJC decisions agree that statements are testimonial when the primary purpose of a reasonable person in the declarant’s position would be to establish or prove facts relevant to a later criminal prosecution. The only distinction remaining is that while the federal jurisprudence considers the formality of the circumstances, the Massachusetts lineage arguably does not. In Gonsalves, the SJC determined that the formality of the circumstances is not relevant to the determination of whether a statement is testimonial because it was concerned that police would purposefully keep circumstances informal. The SJC later abandoned this rationale in Simon, adopting the formality of the circumstances as a relevant criterion per the Supreme Court’s

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111 See Gonsalves, 833 N.E.2d at 557-58 (omitting statements of private citizens from list of testimonial per se statements).
112 See id. (outlining statements that are testimonial per se).
113 See id. (explaining Gonsalves's two step analysis and meaning of "testimonial in fact").
114 See generally Parts II. and III. (describing Crawford, Davis, and Bryant rationales, and their effects on Massachusetts jurisprudence).
115 Compare Bryant, 131 S. Ct. at 1162 ("[W]hen a court must determine whether the Confrontation Clause bars the admission of a statement at trial, it should determine the 'primary purpose of the interrogation' by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs.") with Commonwealth v. Smith, 951 N.E.2d 674, 682 (Mass. 2011) (adopting Bryant's definition for testimonial per se analysis).
116 Compare Davis v. Washington, 547 U.S. 813, 827 (2006) (describing Davis's adoption of formality of circumstances in evaluating potentially testimonial statements), with Fisher, supra note 46, at 616 (describing SJC's limitation of the Davis holding to testimonial per se analysis), and Méndez, supra note 32, at 603 (same).
117 See Gonsalves, 833 N.E.2d at 555 (explaining rationale for rejecting formality as criterion for identifying interrogations).
instruction in *Davis*. That adoption, however, was limited to testimonial per se analysis.

Future Massachusetts courts that fail to consider the formality of the circumstances surrounding statements to persons other than police in testimonial-in-fact analyses are failing to consider that the *Gonsalves* Court was concerned that police might intentionally manipulate the circumstances to later persuade judicial bodies that a statement is nontestimonial (and admissible under the Confrontation Clause), rather than testimonial (necessitating cross examination). Moreover, the *Gonsalves* analysis itself indicated that the formality of the circumstances was relevant to its determination that the victim’s statements to her mother were nontestimonial. While choosing to overlook the formality of the circumstances might seem simpler, as Justice Sotomayor noted in *Bryant*: “simpler is not always better,” and the formality of the circumstances is relevant to the analysis. Additionally, it is far simpler to have one rule governing the evaluation of all statements that accounts for all circumstances regardless of this audience, rather than a separate rule for statements made to persons other than law enforcement officers that ignores the formality of the circumstances.

After *Bryant*, it is clear that statements to law enforcement officers are testimonial when the circumstances would indicate to a reasonable person that they would be used in a subsequent criminal prosecution against the accused. When the circumstances that indicate there is an ongoing emergency, the declarant’s statements are not testimonial. This rule is applicable to any type of statement, not just those made to law

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118 See Commonwealth v. Simon, 923 N.E.2d 58, 73-74 (Mass. 2010) (adopting formality of circumstances as a relevant criteria in testimony per se analysis); Pumphrey, supra note 60, at 19 and accompanying text (same).

119 See *Gonsalves*, 833 N.E.2d at 562 (describing SJC’s limitation of the *Davis* holding to testimonial per se analysis).

120 See id. at 555 (explaining rationale for rejecting formality as a criterion for identifying interrogations).

121 See id. at 561-62 (describing fact-based analysis court used to find victim’s statements to her mother nontestimonial).

122 See Michigan v. Bryant, 131 S. Ct. 1143, 1162 (2011) (suggesting that limiting judicial discretion to consider all relevant facts would be unjustifiable restraint).

123 See THOMAS AQUINAS, BASIC WRITINGS OF SAINT THOMAS AQUINAS 129 (Anton C. Pegis ed. 1945) (“If a thing can be done adequately by means of one, it is superfluous to do it by means of several; for we observe that nature does not employ two instruments where one suffices.”).

124 See id. at 1154 (citing *Davis* v. Washington, 547 U.S. 813, 822 (2006)) (elaborating on the meaning of “testimonial”).

enforcement officers, because the context-driven analysis suggested by the Court is broad enough to apply in all scenarios. For example, some statements, like affidavits, are easy to evaluate because they are likely always testimonial, as the formal circumstances under which they are taken would leave a reasonable person to expect them to be used later in criminal prosecutions. However, as the circumstances under which the statement is made become less formal, but still involve law enforcement officers (i.e., 911 calls and police interrogations), a context-driven fact-specific inquiry becomes more difficult because reasonable people might disagree about when a person might expect their statements to be used in a later criminal proceeding. Lastly, when the contested statements are part of a private conversation, the same context-driven analysis is appropriate, even if the circumstances are more difficult to evaluate. Regardless of the facts, these evaluations should focus on whether a reasonable declarant under the circumstances would expect the statements to be used against the accused in a later criminal proceeding, and not whether the actual parties believed the statements were admissible—the more formal the circumstances, the more likely the parties are reasonable in their belief.

The SJC’s failure to explicitly abandon the two-step process may ultimately mislead and confuse Massachusetts’s lower courts, even though its Confrontation Clause jurisprudence requires an analysis that is substantively equivalent to the Supreme Court’s procedure—both are case-by-case examinations of the facts. As Massachusetts courts may continue to apply additional steps to arrive at the same result, there is the possibility of divergent developments in federal and state common laws in the future; in fact, some Massachusetts courts have continued to rely upon

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126 See Bryant, 131 S. Ct. at 1158-62 (suggesting courts should consider all relevant circumstances to determine testimonial nature of statements).

127 See Commonwealth v. Simon, 923 N.E.2d 58, 73 (Mass. 2010) (“A statement is testimonial per se if it was made in a formal or solemnized form . . . .”) The simplicity of this test may lead courts to forego evaluating each statement in context—a step the Bryant Court discourages judges from overlooking. See Bryant, 131 S. Ct. at 1159 (describing court’s omission of context-dependent analysis as a “failure”).

128 See Bryant, 131 S. Ct. at 1158-59 (listing factors that could inform context-driven analysis). For example, courts might find the medical condition of the declarant, the formality of the circumstances, or the existence of an ongoing emergency important factors to consider. Id. at 1159 (explaining that trial court should have considered declarant’s medical condition).


130 See Lowy & Dudich, supra note 40, at 25 (outlining criteria to determine when statement is testimonial in fact).

131 See Bryant, 131 S. Ct. at 1162 (describing Supreme Court approach as context driven); Gonsalves, 833 N.E.2d at 555-56 (describing SJC approach as context-driven).
the Gonsalves analysis despite Bryant’s applicability.132

V. CONCLUSION

Through the Crawford–Davis–Bryant lineage, the Supreme Court provided a working definition of “testimonial” that parallels, but does not entirely overlap, the interpretation offered by the SJC in Gonsalves. The federal cases only address statements made to government officials in the course of criminal investigations, whereas the SJC and lower courts have had to apply the federal doctrine to statements made to persons other than government actors. While both courts’ definitions are harmonious, Massachusetts requires an additional two-step analysis. The Supreme Court has not evaluated Massachusetts’s process in its decisions, but nevertheless, the SJC has had to adjust the procedure to remain in step with federal Confrontation Clause jurisprudence. While this procedure was once valuable, it has become outdated in light of subsequent Supreme Court decisions, and is becoming increasingly useless as federal Confrontation Clause develops in the post-Crawford era.

All statements (including affidavits, 911 calls, and statements to police officers and family members) are measurable against the current federal standard. With Gonsalves’s two-step process having no genuine procedural effect and negligible (if any) substantive effect, courts evaluating whether statements made to persons other than law enforcement officers should abandon the procedure and simply rely upon the existing common law without making a distinction between statements that are testimonial per se and testimonial in fact. The court should ask: Would a reasonable person in the declarant’s shoes expect their statement to be used against the defendant in a later criminal proceeding? If so, the statement is testimonial, and the defendant must have the opportunity to cross-examine the declarant.

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132 See Commonwealth v. Figueroa, 946 N.E.2d 142, 150-51 (Mass. App. Ct. 2011) (evaluating declarant’s statement to her doctor using Gonsalves’s two-step Confrontation Clause analysis). The court in Figueroa did not consider the Bryant ruling, published a month earlier, as part of its analysis. Id. While Bryant may not have been expressly controlling, the court missed the opportunity to support its analysis of the formality of the exchange with the Supreme Court’s recent exposition of the importance of formality as a factor in identifying testimonial statements. See Bryant, 131 S. Ct. at 1160 (discussing value of considering formality of conversation in identifying testimonial statements).